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Peter Townsley

United States District Court
Northern District of California

UNITED STATES OF AMERICA

Plaintiff,

vs.

PETER TOWNSLEY,

Defendant.

No. CR 10-0428 CRB

Peter Townsley's Reply

Memorandum Regarding

Sentencing

Date: November 7, 2012

Time: 2:00 p.m.

Place: Courtroom 6

Peter Townsley, by counsel, respectfully submits the accompanying
reply memorandum in response to the position of the United States Attorney.

Dated: 11/02/2012

Signed: /s/ *Evan A. Jenness*

Dated: 11/02/2012

Signed: /s/ William J. Genego

Attorneys for Peter Townsley

Table of Contents

I.	Introduction	1
II.	Reply to the Government's Sentencing Analysis.....	1
A.	Peter Townsley Has Unequivocally Accepted Full Responsibility for His Wrongdoing.....	1
B.	The Seriousness of the Offense is Fairly Viewed in Context, and in Light of Peter Townsley's Background and Motivation	1
C.	Increased Regulatory Costs Have Resulted More From the Growth of the Organics Industry, and Governmental Priorities, Than From Peter Townsley's Wrongdoing	3
D.	Issues Regarding Consumer Confidence in Organics Are Prevalent, Longstanding and Far Broader Than Peter Townsley's Wrongful Conduct.....	6
E.	Peter Townsley Should Be Sentenced Based on the Facts Before the Court and Not The Theoretical Possibility of Graver Consequences of His Wrongdoing	8
F.	The Interest in Avoiding Sentencing Disparities Supports the Recommended Sentence.....	8
G.	Peter Townsley Will Never Again Run Afoul of the Law, and the Publicity About this Case and Rarity of the Violation Support the Conclusion That Lengthy Imprisonment is Unnecessary for General Deterrence.....	9
III.	Conclusion	9

1 **Table of Contents**

2

3 **CASES**

4 *United States v. Chase*, 11-cr-60133 (D. Or.)2

5 *United States v. Nelson*, 11-cr-96 (E.D. Cal.)9

6

7 **OTHER AUTHORITIES**

8 Another Sprouts Recall Due to Listeria Contamination (July 31, 2010).....7

9 Healthy or Hype? Sixteen Most Misleading Food Labels (June 11, 2012).....7

10 Little Evidence of Health Benefits From Organic Foods, Stanford Study

11 Finds,

12 Brandt, Michelle (Sept. 3, 2012) 6

13 New Management at USDA Reforms, Strengthens Nat'l Organic Program,

14 The Cornucopia Institute (March 18, 2010)..... 3

15 Organic Food Health Risks (May 26, 2011)6

16 Organic Trade Association, 2011 Organic Industry Survey 3

17 Organic Trade Association,

18 Industry Statistics and Projected Growth (June, 2011)..... 7

19 Organic Advocates Decry Lax Oversight,

20 The Washington Independent (March 23, 2011)..... 3

21 Organic Grape Tomatoes Recalled Over Salmonella Risk (Sept. 28, 2011).....7

22 Press Release, Patrick Leahy (D. Vt.), (March 18, 2010).....5

23 Recalled Raw Milk Sold at Nearly 150 California Locations (Sept. 10, 2012)..6

24 Spinach Contamination Confirmed as Organic (March 2, 2007)..... 6

25 USDA Inspector General Finds Bush Administration Ignored Organic

26 Laws.....3

27

28 USDA's Organic Enforcers Let Offenders Slide, Audit Says,

The New York Times (March 19, 2010)..... 5

REPLY MEMORANDUM

I. Introduction

Peter Townsley is fairly punished for the actual and reasonably foreseeable consequences of his wrongdoing. But, the government goes too far by asking that he be severely punished based on the possibility of farms being decertified when no farms were in fact decertified, or attenuated matters in which his conduct played little or no role, such as the increased costs and burdens of regulation in the organics industry.

Peter Townsley has expressed contrition and greatly regrets his wrongdoing. The facts in this case are highly unusual and his violation is an extreme rarity. The sentence recommended by the Probation Officer appropriately balances the wrongfulness of Mr. Townsley's conduct and its adverse effects on others with the nature of the violation and mitigating facts and circumstances, and fairly considers all applicable sentencing considerations.

II. Reply to the Government's Sentencing Analysis

A. *Peter Townsley Has Unequivocally Accepted Full Responsibility for His Wrongdoing*

Peter Townsley's acceptance of responsibility and apology are complete and unequivocal, as reflected in his plea, cooperation with the Probation Office and letter to the Court, and the letters to the Court from those who know him well. The government's suggestions to the contrary do not fairly describe Mr. Townsley's actions or position.

B. *The Seriousness of the Offense is Fairly Viewed in Context, and in Light of Peter Townsley's Background and Motivation*

The government mistakenly attributes Peter Townsley's offense to greed. The evidence is to the contrary. The financial information provided to the Probation Office, Peter Townsley's letter to the Court, and the letters to

1 the Court from those who know him best, support the conclusion that his
 2 wrongdoing was motivated by a profound desire to make a contribution to the
 3 organic fertilizer industry that overwhelmed his regard for the law. As
 4 described by Brian Townsley in his letter to the Court:

5 “He was, in my mind, not in it for the money. Rather he was at
 6 the leading edge, the initial days of a mostly unregulated organic
 7 industry wherein consumers still died from e-coli infection. Peter
 8 believed in and made a product that could make a difference.”

9 See Peter Townsley’s Sentencing Brief, Exh B.¹

10 The nature of Peter Townsley’s violation also evidences that he was not
 11 motivated by greed. If greed had been his motive, he would have done what
 12 the defendant did in the Oregon case cited by the prosecutor – purchased an
 13 inexpensive inorganic product and relabeled it.²

14 Peter Townsley’s offense occurred in the context of attempting to realize
 15 a longstanding vision to bring to market a technology intended to create an
 16 improved and safer product. He has admitted violating the law in his efforts
 17 to do that, but his offense should be viewed in this context.

18
 19 ¹ See also Letters from Beth Ostlund (“Peter has no greed, but is
 20 generous”), Georg Koslowski (“He is a good person and a hard worker with a
 21 social conscience”), Patrick Casey (“Peter has always maintained a modest,
 middle-class lifestyle”).

22 ² *United States v. Chase*, 11-cr-60133 (D. Or.) (defendant purchased
 23 inorganic corn, relabeled it as organic, and resold it). The instant case does
 24 not involve aggravating facts like those in *Chase* that contributed to the
 25 lengthy sentence imposed: Chase’s use of multiple aliases to conceal his
 26 repeated purchases of inorganic product, relabeling, and resale of the goods as
 27 organic; false claims the corn was purchased from a certified organic grower;
 28 and evidence Chase had previously engaged in a similar scheme regarding
 onions, which the government agreed not to prosecute as part of the plea. *Id.*,
 Dkt. Nos. 1, 7, 11. If there were any mitigating facts in the *Chase* case, they
 are not evident from the public record as the defense submitted no sentencing
 brief and did not respond to the government’s brief.

C. *Increased Regulatory Costs Have Resulted More From the Growth of the Organics Industry, and Governmental Priorities, Than From Peter Townsley's Wrongdoing*

The government asks the Court to sentence Peter Townsley based on the increased costs of regulation borne by all in the area of organics, including those who choose to consume organic food. However, the history of organics regulation in this country, and in California, makes clear that Mr. Townsley's wrongdoing was a minuscule part of the many issues that have led to increased regulatory costs and burdens in the area of organics.

The growth of the industry and an increased enforcement effort by the government, spurred by a USDA OIG audit report, were the leading causes of the increase in such costs to organic farmers and consumers of organic products.

First, the organics food and beverage market grew from a \$1 billion market in 1990 to \$26.7 billion market in 2010.³ Such economic evolution inevitably gives rise to increased regulation and concomitant costs.

Second, for many years, organics laws and regulations apparently may not have been a governmental priority and enforcement was comparatively lax, both federally and in California in particular.⁴ A March 9, 2010 audit

³ Organic Trade Association, 2011 Organic Industry Survey, at: <http://www.ota.com/organic/mt/business.html>.

⁴ See, e.g., *USDA Inspector General Finds Bush Administration Ignored Organic Laws; New Management at USDA Reforms, Strengthens National Organic Program* (The Cornucopia Institute, March 18, 2010) (describing "audit and investigation of alleged improprieties at the USDA's National Organic Program . . . substantiating the allegations of prominent organic industry watchdog groups — that under the Bush administration, the USDA did an inadequate job of enforcing federal organic law."), at: <http://www.cornucopia.org/2010/03/usda-inspector-general-finds-bush-administration-ignored-organic-laws/>; *Organic Advocates Decry Lax Oversight* (The (continued...))

1 report by the USDA's Office of Inspector General documents this phenomenon
 2 in detail.⁵ According to the audit, the National Organic Program's failure to
 3 promptly follow through on investigations allowed some companies to falsely
 4 advertising products as organic for years; between 2006 and 2008 it took NOP
 5 staff an average of 15 months to act on enforcement recommendations of the
 6 USDA; and the NOP needed to "further improve program administration and
 7 strengthen their management controls to ensure more effective enforcement
 8 of program requirements when serious violations, including operations that
 9 market product as organic while under suspension, are found. In addition,
 10 they need to strengthen their oversight of certifying agents and organic
 11 operations to ensure that organic products are consistently and uniformly
 12 meeting NOP standards." *Id.*, p 1. The report also noted:

13 "NOP officials need to address ongoing issues with California's
 14 State Organic Program (SOP). . . . When officials of the
 15 California Department of Food and Agriculture applied to have
 16 an approved SOP, they did not have the required compliance and
 17 enforcement procedures in place. NOP officials approved
 18 California's program because they wanted to allow California the
 19 opportunity to operate and develop procedures as they
 20 progressed. . . . Although NOP officials believed that the State
 21 would address these issues following its initial approval, they
 22 discovered in a 2005 review that the California SOP continued to
 23 lack these required procedures. . . . [T]he California SOP is not
 24

25 ⁴(...continued)

26 Washington Independent, March 23, 2011), at:
 27 <http://washingtonindependent.com/106852/organic-advocates-decry-lax-oversight>

28 ⁵ See www.usda.gov/oig/webdocs/01601-03-HY.pdf.

1 equipped to properly enforce the requirements of the NOP.”
 2 *Id.*, p. 2. Governmental priorities reflected in the national proposed 2011
 3 budget dovetailed with this report, and appeared to launch a new era of
 4 enforcement.⁶ As Vermont Senator Patrick Leahy stated in response to the
 5 report:

6 “The organic standards and labeling program is still young, and
 7 these are crucial formative years. This audit will help us clean
 8 the slate from a recent period of coasting by strengthening the
 9 program where it needs strengthening.”

10 Sen. Patrick Leahy (D. Vt.), Press Release (March 18, 2010).⁷

11 The evolution of the organics industry and government regulation of it
 12 places this case in context and shows that the prosecution over-reaches in
 13 arguing that Mr. Townsley’s conduct had “ripple effects” reaching “the entire
 14 organic industry,” was “far-reaching,” had a role in “undermining the
 15 integrity of the organic agriculture industry,” and had “ramifications
 16 throughout the entire organic food chain,” and that Mr. Townsley therefore
 17 should be punished based on costs “passed on to the organic industry.”

18
 19 ⁶ See *USDA’s Organic Enforcers Let Offenders Slide, Audit Says*, New
 20 York Times (March 19, 2010) (Steve Etka, legislative director of the National
 21 Organic Coalition, described the audit as “encouraging,” and stated, “In the
 22 past ... there wasn't a lot of assurance that there would be the will within the
 23 administration to fix these problems Now that's completely reversed and
 24 there's a very strong dedication to this program within USDA. We see many
 signs that the program is already well on its way to fixing these problems.”;
 describing the NOP as one of the President’s “priorities within the USDA”).

25 ⁷ *USDA’s Acceptance of Audit Findings Helps Clean the Slate for 20-Year-*
 26 *Old Organic Standards And Labeling Program to Advance to the Next Level*,
 at:
 27 [http://www.leahy.senate.gov/press/usdas-acceptance-of-audit-findings-helps-cl](http://www.leahy.senate.gov/press/usdas-acceptance-of-audit-findings-helps-clean-the-slate-for-20-year-old-organic-standards-and-labeling-program-to-advance-to-next-level)
 28 [ean-the-slate-for-20-year-old-organic-standards-and-labeling-program-to-adva](http://www.leahy.senate.gov/press/usdas-acceptance-of-audit-findings-helps-clean-the-slate-for-20-year-old-organic-standards-and-labeling-program-to-advance-to-next-level)
[nce-to-next-level.](http://www.leahy.senate.gov/press/usdas-acceptance-of-audit-findings-helps-clean-the-slate-for-20-year-old-organic-standards-and-labeling-program-to-advance-to-next-level)

D. *Issues Regarding Consumer Confidence in Organics Are Prevalent, Longstanding and Far Broader Than Peter Townsley's Wrongful Conduct*

The government seeks to punish Peter Townsley for consumer confidence issues that preceded, followed and are far broader than his wrongdoing. In this case, just one purchaser of Biolizer XN submitted a statement to the government in response to the solicitations it sent to purchasers of Biolizer XN. When viewed in the broader context, it appears clear Peter Townsley's wrongdoing could not have had the greater impact on consumer confidence in organic foods that the government claims.

There are numerous issues unrelated to Peter Townsley's wrongdoing that tend to undermine consumer confidence in organics. First, consumer confidence in organic products is substantially undermined by hard science such as Stanford University's comprehensive recent study indicating that the claimed health benefits of organic foods are unfounded.⁸ Second, consumer confidence in organic products likely is undermined by publicity about the many outbreaks of poisoning resulting from E. Coli., Salmonella, Listeria and other toxins found in some organic foods.⁹ Third, national organics

⁸ See Michelle Brandt, *Little Evidence of Health Benefits From Organic Foods, Stanford Study Finds* (Sept. 3, 2012), at: <http://med.stanford.edu/ism/2012/september/organic.html>.

⁹ See, e.g., *Organic Food Health Risks* (May 26, 2011) (describing health risks of organics: organic pesticides, parasites, mycotoxins, and fecal contaminants), at: <http://www.livestrong.com/article/376727-organic-food-health-risks/>; *Recalled Raw Milk Sold at Nearly 150 California Locations* (Sept. 10, 2012), at: <http://www.foodsafetynews.com/tag/organic-pastures/> (describing California Department of Public Health recall of Organic Pastures milk found to contain *Campylobacter*);

(continued...)

1 regulations permit products be sold as “organic” which are grown overseas,
 2 which may implicate consumer confidence given the government’s limited
 3 ability to enforce United States law in foreign countries. Fourth, consumer
 4 confidence probably is adversely affected by the array of confusing terms used
 5 in marketing that do *not* actually denote a product that is “organic” under the
 6 law, including “healthy,” “all natural,” “natural,” “100% natural,” “made with
 7 real fruit,” and “made with whole grains,” among many others.¹⁰

8 Notwithstanding the many issues that undoubtedly have a material
 9 impact on consumer confidence in organics, the industry in the United States
 10 has continued to grow over time.¹¹

11 In sum, a broad array of matters unrelated to Peter Townsley’s
 12 violation have an adverse impact on consumer confidence in the organics
 13 industry, but the industry has grown nonetheless. The impact of Peter
 14 Townsley’s wrongdoing is most fairly viewed in this broader context.

15
 16 ⁹(...continued)

17 *Spinach Contamination Confirmed as Organic* (March 2, 2007), at:
 18 <http://www.openmarket.org/2007/03/02/spinich-contamination-confirmed-as-organic/> (describing E. Coli outbreak that sickened over 200 and killed 3 people
 19 and was traced to a California organic farm);

20 *Organic Grape Tomatoes Recalled Over Salmonella Risk* (Sept. 28, 2011), at:
 21 <http://www.foodpoisonjournal.com/food-recall/larry-schultz-organic-egg-farm-linked-to-salmonella-illnesses/>.

22 *Another Sprouts Recall Due to Listeria Contamination* (July 31, 2010)
 (describing recall of organic sprouts found to contain listeria), at:
 23 <http://www.foodpoisonjournal.com/2010/07/>.

24 ¹⁰ *See Healthy or Hype? Sixteen Most Misleading Food Labels* (June 11,
 25 2012), at: www.health.com/health/gallery/0,,20599288,00.html; Farnoosh
 26 Torabi, *Five Misleading Food Labels*, at:
 27 http://www.cbsnews.com/8301-505144_162-57369865/5-misleading-food-labels/.

28 ¹¹ Organic Trade Association, *Industry Statistics and Projected Growth*
 (June, 2011), at: <http://www.ota.com/organic/mt/business.html>.

E. *Peter Townsley Should Be Sentenced Based on the Facts Before the Court and Not The Theoretical Possibility of Graver Consequences of His Wrongdoing*

The government places great emphasis on the potential for certifiers to have lost their organic certification because of their use of Biolizer XN. Had such a dire consequence resulted, this case would be a different one. Peter Townsley certainly greatly regrets putting any customer at any risk, given his commitment to the organics industry and overarching quest to market a superior product. However, no farm was decertified as a consequence of using Biolizer XN, and indeed there is no evidence that any farm *ever* lost its certification for using an inappropriate fertilizer during the entire time period in question. Particularly in light of his contrition, Mr. Townsley should be punished based on the actual effects of his conduct and not the theoretical possibility or a graver consequence.¹²

F. *The Interest in Avoiding Sentencing Disparities Supports the Recommended Sentence*

The government cites a pending Eastern District of California case regarding its argument that sentencing consistency supports lengthy imprisonment of Mr. Townsley. The argument is speculative because the defendant in that case has not yet been sentenced (no sentencing briefs have even been filed). It also might be noted that if the defendant in that case

¹² It also bears mention that if any farm had been decertified, an intervening and more proximate cause would have been certifiers' wrongful reliance on OMRI listing. As this Court has found, "certifying agents were not supposed to use OMRI Listing as a substitute for their obligation to determine whether a farming input was permissible under federal law" and "certifying agents were chastised by the USDA for" reliance on OMRI listing. See Dkt. 56, at 5 (Order); see also Dkt. 50 (Reply Memo in Support of MTD Counts 9 & 10), Ehs A, E, F (citations issued to certifiers for relying on OMRI listing).

1 were given the prison term posited by the government (78 months), this
 2 would amount to one month of imprisonment for each \$256,410 to \$641,025 of
 3 the agreed “loss” under USSG 2B1.1(b) (\$20 million to \$50 million).¹³ An
 4 equivalent, consistent sentence in this case would be approximately 4-10
 5 months of incarceration.

6 G. *Peter Townsley Will Never Again Run Afoul of the Law, and the*
 7 *Publicity About this Case and Rarity of the Violation Support the*
 8 *Conclusion That Lengthy Imprisonment is Unnecessary for*
 9 *General Deterrence*

10 Peter Townsley has been out of the organics business for many years
 11 and poses no risk of recidivism. The publicity generated in the organics
 12 community about this case has substantial general deterrent value, and the
 13 rarity and dated nature of the violation suggests there is no great need to use
 14 the sentence in the case to advance the interests of general deterrence.

15 **III. Conclusion**

16 For the reasons set forth in the Presentence Report and the briefs
 17 submitted on behalf of Peter Townsley, the defense respectfully requests that
 18 the Court impose the sentence recommended by the Probation Officer.

19
 20 Dated: 11/02/2012 Signed: /s/ Evan A. Jenness

21
 22 Dated: 11/02/2012 Signed: /s/ William J. Genego

23 Attorneys for Peter Townsley
 24 _____

25 ¹³ *United States v. Nelson*, 11-cr-96 (E.D. Cal.) (plea agreement states
 26 defendant indicted on 28 counts used five companies to market three
 27 inorganic fertilizers as organic in 2003-2009; products were manufactured
 28 using three synthetic chemicals; defendant submitted false statements to a
 state agency and OMRI; and agreed “loss” amount is between \$20 million and
 \$50 million). *Id.*, Dkt. No. 27.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2115 Main Street, Santa Monica, California 90405.

On November 2, 2012, I served the foregoing document described as **Peter Townsley's Reply Memorandum Regarding Sentencing** on each interested party, as follows:

Sara Black
U.S. Probation officer
United States Probation office
450 Golden Gate Avenue
Suite 17-6884
San Francisco, CA 94102-3487

BY FEDEX: I enclosed the document(s) in an envelope or package addressed to each interested party at the address listed above or on the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such envelope or package to a carrier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2012, at Santa Monica, California.

/s/ Evan A. Jenness
EVAN A. JENNESS